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November 3, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: PP Docket No. 93-253 -- Ex Parte Filing

Dear Mr. Caton:

GO Communications Corporation ("GO"), by its attorneys and pursuant to §1.1206(a)(1) of the Commission's rules, hereby submits this ex parte presentation in support of it previous filings in the above referenced docket as the Commission reconsiders the rules governing designated entity ("DE") participation in broadband PCS. The Commission's Entrepreneurs' Blocks provide a sound regulatory framework to implement Congress' broad mandate for a diverse, competitive and robust communications marketplace. Under this framework, DEs have real opportunities to become viable competitors in the telecommunications marketplace.

GO urges the Commission to ensure that the competitive promise of the Entrepreneurs' Blocks is realized by clarifying its rules so that DEs can attract capital investment of the magnitude necessary to fund broadband PCS while ensuring that its rules do not permit investors to render captive their DE partners. Although there is a certain amount of tension between these two objectives, GO believes its recommendations strike an appropriate balance so that both objectives can be realized.

I. Capital Formation is Crucial to Designated Entity Participation

The existing requirement for the creation and maintenance of a control group which holds at least 25 percent of the entity's total equity and 50.1 percent voting control is sound policy and

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should be preserved. These two requirements create a workable framework from which DEs can become bona fide owners and operators of broadband PCS licenses without being dominated by their investors.

A. Passive Individual and Institutional Investments Should Be Allowed in the Control Group

To address the realistic capital raising constraints faced by DEs and the strong desire of investment companies,[1/] insurance companies and trust departments of banks ("Institutional Investors") to participate with DEs at the control group level, the Commission should permit Institutional Investors to hold up to 25 percent of the entity's total equity, up to 10 percent of which could be held as control group equity as long as the remaining 15 percent is held as passive equity outside the control group. Under this scenario, the Institutional Investors' total assets and gross revenues would not be attributable with respect to determining the DE's eligibility for the Entrepreneurs' Blocks. Institutional Investors should be limited to a strictly passive role in the DE such that it does not possess voting interests within the control group. In summary, Institutional Investors' assets and revenues would not be attributable if they hold both control group and passive equity as long as an Institutional Investor's total equity interest does not exceed 25 percent of the DE's total equity and its voting interest does not exceed 15 percent of the DE's passive voting interest.

This approach to participation of Institutional Investors in the control group qualifications permits DEs the ability to raise the necessary capital to fund the control group while still ensuring that it retains control of the PCS license. In fact, adoption of this modification comports with Commission recognition of the value of institutional investment to expand the availability of capital to the broadcast and cable industries without the risk of attribution errors. Multiple Ownership Rules, 97 FCC 2d 997, 1013 (1984). The Commission's broadcast, cable and newspaper multiple ownership rules permit up to a 10

1/ An investment company is an entity defined in 15 U.S.C. §80a-3(a) and (b), but without reference to or incorporation of the exemptions set forth in 15 U.S.C. 80a-3(c); provided, however, that if such investment company is affiliated with other entities, then the investment company and such entities, taken as a whole, must be primarily engaged in the business of investing, reinvesting, distributing, or trading in securities or providing investment management services for securities.

percent passive institutional investment. 47 C.F.R. § 73.3555 Note 2(c). Likewise, institutional investment within a designated entity's control group will permit efficient capital aggregation so that viable DEs will emerge.

If Institutional Investors are allowed in the control group as passive investors, it follows logically that individuals with net worth in excess of $100 million or $40 million (if a small business) should be permitted to take a similar position within the control group without having their assets and revenues attributed. As long as the individual maintains no voting interest in the control group, the qualifying members of the control group will continue to hold de jure and de facto control of the DE as mandated by the Commission's rules. 47 C.F.R. § 24.720(k).

B. All Ownership Interests Should Be Calculated on a Fully Diluted Basis

The Commission should clarify that all ownership interests, including those in the control group, will be calculated on a fully diluted basis such that all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.[2/] 47 C.F.R. § 24.709 Note. Specifically, control group members, including Institutional Investors, should be able to hold their share of the 25 percent total equity requirement as stock options to purchase the Company's equity so long as:

(1) the stock options vest immediately and unconditionally to the holder upon issuance allowing the holder to exercise the options at his/her sole discretion; and

(2) the stock option's strike price is set at, or below, the fair market value of the capitalization of the Company (i.e., at the offer price of the underlying stock).

The use of options to fill out the 25 percent equity requirement reflects the need to provide incentives for control

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2/ Indeed, the Commission should be vigilant in scrutinizing carefully those relationships between investors and qualifying DEs to ensure that Commission policies are not circumvented. For example, loans from strategic investors to DEs in exchange for stock pledge agreements should be counted on a fully diluted basis when calculating the strategic investor's share of total equity so that the investor's share of total equity will not exceed the permissible levels set by the Commission.

group members and passive investors to risk a substantial amount of capital that is illiquid for the five-year holding period. In light of other financial thresholds that DEs must meet in order to qualify for the Entrepreneurs Band, the use of options are a reasonable means of encouraging qualified entities to become bona fide PCS operators with a substantial financial stake in the business.

With these clarifications and modifications, the Commission's rules will be sufficiently flexible to allow for efficient capital formation by DEs to compete successfully in the telecommunications marketplace.

II. Retain Existing Cap on Number of Licenses Won by DEs

The Commission should maintain the 10 percent cap on the total number of Block C and F licenses that can be won at auction by any one DE. GO strongly opposes proposals which have been made by commenters to impose a further limit on the number of POPs, e.g. 25 million, that could be served by any single DE. DEs must be able to compete against holders of MTA licenses. The New York MTA alone is 26.4 million POPs. DEs should not be precluded from acquiring sets of BTA licenses which are equivalent to the sets of licenses held by their competitors with MTA licenses.

Imposition of artificial POP limits only on new entrants in the C and F blocks will drive away support from the capital markets. Investors are already concerned about the abilities of DEs to compete as the fifth license in a wireless market comprised of two ongoing cellular operators and two PCS operators owned by dominant telecommunications companies. In recent months this concern has only been heightened by rampant industry consolidation among the established telecommunications companies preparing for the auction of blocks A and B. Any regulatory scheme, no matter how well intentioned, that limits opportunities for achieving economies of scale and national interoperatility will chill the flow of institutional money to DEs.

Artificial POP limits only aid entrenched telecommunications companies and the handful of DEs they invest in to fill out strategic markets they are unable to obtain in the A/B auction. Potential holders of Block A and B licenses are not limited in the number of licenses they may acquire. Were a pop limit to be imposed on DEs, they would be put at a competitive disadvantage vis a vis owners of Block A and B licenses. Thus, the policy impact of such limits is that the C and F blocks will not achieve the competitive diversity envisioned by Congress.

III. Safeguards Against Entrepreneurs' Blocks Being Dominated by the Strategic Investor

One of Congress' objectives in providing the Commission authority to auction spectrum licenses in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") was to avoid excessive concentration of licenses among existing industry players by disseminating licenses to a wide variety of applicants including designated entities to further competition in the telecommunications industry. 47 U.S.C. § 309(j)(3)(B). Indeed, Congress instructed the Commission to prescribe regulations that ensure that designated entities become owners and operators of spectrum-based services while preventing unjust enrichment and the use of fronts to subvert the Commission's rules. Id. at § 309(j)(4)(C) and (D).

The Commission has implemented the Congressional mandate faithfully by creating a regulatory structure in which qualifying control group members must maintain de facto control of the PCS license. To ensure that the Commission will not be embroiled in years of litigation regarding alleged sham operations, the Commission should clarify its rules for determining whether a DE remains in de facto control of a license. This has gained importance in light of the recent ex parte filings made by several Bell Operating Companies which appear to conflict with both Congress' and the Commission's intent.

A. A Bright Line Test is Needed to Determine De Facto Control

The Commission's rules provide for two different potential types of investors in the C and F blocks: Institutional Investors and strategic partners. The major difference between the two types is that the former are not owners, operators or licensees of existing telecommunications facilities, be they wireline or wireless. The latter, generally are entrenched telecommunications services providers currently regulated under Title II (common carriers) and Section 332 (commercial mobile radio services providers) of the Communications Act.

The presence of levers of control held by strategic partners, e.g., capital call options, rights of first refusal, preferential rights to dividends and attributable management contracts, raise particular concerns regarding the ability of the DE to maintain de facto and de jure control of the license. Accordingly, the Commission should engraft onto its Intermountain test for de facto control the principles of its transfer of control decisions to ensure that de facto control continues to reside with qualifying control group members. The Commission's

transfer of control decisions provide ample guidance with respect to the extent of permissible safeguards to protect non-control group members' investment. In particular, the Commission's past analyses have focused on the individual factors as well as the cumulative effect of all relevant factors to determine whether the goals underlying its rules will be served or hindered by the corporate structure and relationships presented. News International, 55 R.R. 2d 945, 952 (1984); KKR Associates, 64, R.R. 2d 143 (1987).

The Commission has clear precedent that delineates the extent of reasonable investor protections which do not cross the line to de facto control by investors, i.e. protecting investors while not permitting them to dominate or determine the policies of the licensee. McCaw Cellular, 66 R.R. 2d 667 (1989). Supermajority approval by non-control group shareholders and minority investor consent requirements for the following corporate actions have been permitted by the Commission because they do not constitute a transfer of control and serve only to protect the minority's interest from dilution:

(1) amendments to the entity's by-laws or articles of incorporation;

(2) merger or other consolidation by or with the entity;

(3) transaction involving the disposition (sale or lease) of all or substantially all of the entity's assets;

(4) voluntary dissolution or liquidation of the entity;

(5) issuance of new or additional equity;

(6) declaration of dividends;

(7) purchase of stock of other corporations; and

(8) making or guaranteeing loans.

See e.g., MCI Communications, FCC 94-188, Slip Op. at 6 (released July 25, 1994); McCaw Cellular, 66 R.R. 2d 667, 674 (1989); News International, 55 R.R. 2d at 950; Data Transmissions, 44 FCC 2d 935, 936-37 (1974). Accordingly, non-control group investors should be able to exercise similar approval rights without the possibility of gaining de facto control of the DE.

In addition, due to the risks presented by acquiring licenses through spectrum auctions, non-control group investors

should be able to approve ranges of bids for PCS licenses and auction bid amounts above previously approved bid ranges. With this protection, non-control group investors can protect against dilution of their interests in the entity during the auction process.

B. Rights of First Refusal, Capital Call Options, Preferential Rights to Dividends and Management Contracts Undermine the Commission's De Facto Control Requirement

So-called investor protections such as capital call options and the use of attributable management contracts coupled with rights of first refusal and preferential rights to dividends undermine the Commission's polices which require de facto control to reside with the DE and are analogous to Commission cases where a transfer of control has occurred. For example, capital call options which permit strategic partners to remove "non-performing" DEs at will demonstrate that de facto control resides with the strategic partner. Permitting strategic partners such a right allows them to dominate and determine each and every policy the DE adopts because they control the most important personnel decision in a company: deciding the management team. Thus, the DE will be but a mere captive of the strategic partner.

If a management contract is deemed to be attributable to the party providing the services under the Commission's recently adopted rules in GN Docket No. 93-252, the contract should also be deemed to transfer de facto control to that third party, including those cases where the third party is one of the DE's investors. Specifically, permissible management contracts between DEs and third parties should be based upon whether a third party manager is a "subcontractor" for specific, non-control function(s) (e.g., construction, system design, marketing, customer service, accounting, etc.). Conversely, if the third party manager operates as general contractor with responsibilities for the operation and integration of a complete system, this arrangement should be deemed an impermissible transfer of control of the license. This test should be applied to the cumulative effects of all management contracts a DE has with one third party. Finally, the Commission should not permit a grace period within which to bring nonconforming contractual arrangements into compliance. A grace period could encourage parties to enter into nonconforming agreements with impunity because the parties will have the ability to cure their agreements at a later date with no associated ill effects.

The subversive effects of strategic partner held capital call options and attributable management contracts are

highlighted if the strategic partner also has a right of first refusal. Rights of first refusal offer no incentives for strategic partners to optimize the economic value of the license or to maximize the efficient use of the spectrum during the anti-trafficking period. A strategic partner is encouraged to depress the value of the value of license during the five-year holding period so that it can compel the sale of the license to itself at a below-market value at the first possible opportunity at the expiration of the holding period. The use of either consent rights or supermajority clauses, which require strategic partner approval before certain extraordinary corporate actions, eliminate the need for rights of first refusal because the strategic partner can block the sale of the license to an "unsuitable" party. Thus, rights of first refusal are unnecessary to "protect" passive investment.

C. Cumulative Effects of Rights of First Refusal, Capital Call Options and Management Contracts Subvert the Entrepreneurs' Blocks

The Commission should recognize the deleterious cumulative effect that capital call options, rights of first refusal and management service agreements between DEs and strategic partners will have on the Commission's objectives of licensing bona fide DEs. In light of the Commission's existing rules which provide that strategic partners may have substantial interests in a DE, the cumulative effect of these proposals will ensure that the DE will be the instrument through which a strategic partner hoards spectrum until it can purchase the license at the end of the five-year holding period. In fact, there is no way for the Commission to monitor whether the strategic partner can force the sale of the underlying license to itself. In the end, the strategic partner will be permitted to warehouse spectrum during the five-year anti-trafficking period and lessen competition to existing wireless services providers, both results which contradict Congress' and the Commission's intent to provide additional sources of competition to existing telecommunications providers.

This result is even more pernicious if the strategic partner is an existing owner or operator of wireless or wireline telecommunications services. Congress' mandate to the Commission will be frustrated if, at the end of the holding period, existing telecommunications entities hold the licenses originally licensed to DEs. To prevent this from occurring, the Commission should prohibit the use of these three measures on both an individual and cumulative basis if the holder/investor of the right is an existing telecommunications provider regulated by the Commission under Title II (local exchange or interexchange carrier) or

Section 332 (commercial mobile radio services provider) of the Communications Act. Should the Commission allow a strategic partner to hold a right of first refusal in a DE, it should be tied to a seven-year holding period. By instituting these restrictions, new market entrants will be introduced into the telecommunications marketplace in furtherance of Congress' objectives.

IV. Conclusion

The Commission, in its Fifth Report and Order has established a sound regulatory framework capable of encouraging a more diverse, competitive and robust communications marketplace. The Commission, however, should clarify its rules, as detailed in the attachment, so that DEs can complete the task of raising the necessary capital to participate in the PCS auctions while preventing strategic partners from transforming the Entrepreneurs' Blocks into mere captives of existing, telecommunications industry participants.

In closing,, we note that the original and two copies of this filing were submitted to the Secretary of the Commission in accordance with Section 1.1206(a)(1) of the Commission's rules.

Respectfully Submitted,

GO COMMUNICATIONS CORPORATION

By _____

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SUGGESTED CHANGES TO § 24.709 and § 24.720
ADDITION OF §24.715 -- MANAGEMENT CONTRACTS

§ 24.709 Eligibility for licenses for frequency Blocks C and F.

(a) General Rule

(1) No application is acceptable for filing and no license shall be granted for frequency Block C or frequency Block F, unless the applicant, together with its affiliates and persons holding interests in the applicant and their affiliates, have gross revenues of less than $125 million in each of the last two calendar years and total assets of less than $500 million at the time the applicant's short-form (Form 175) application is filed.

(2) No application is acceptable for filing and no license shall be granted for frequency Block C or frequency Block F, if, at the time the application is filed, the applicant (or person holding an interest in the applicant) is an individual and he or she (or affiliates) has $100 million or greater in personal net worth at the time the applicant's short-form (Form 175) application is filed.

(3) Any licensee awarded a license pursuant to this section (or pursuant to §24.839(d)(2)) shall maintain its eligibility until at least five years from the date of initial license grant, except that increased gross revenues, increased total assets or personal net worth due to non-attributable equity investments (i.e., from sources whose revenues, total assets and personal net worth are not considered under paragraph (b)(4) of this section), debt financing, revenue from operations, business development or expanded service shall not be considered.

(b) Attribution and Aggregation of Gross Revenues and Total Assets, and Personal Net Worth

(1) Except as specified in paragraphs (3) ~~and~~, (4) **and (5)**, the gross revenues and total assets of the applicant (or licensee) and its affiliates, and other persons that hold interests in the applicant (or licensee) and their affiliates shall be considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency Block C or frequency Block F under this section.

(2) The personal net worth of individual applicants (or licensees) and other persons that hold interests in the applicant (or licensee), and their affiliates, if under the amount in paragraph (a)(2) **or if held by an individual who is a member of the applicant's (or licensee's) control group and holds less than 10 percent of the applicant's (or licensee's) control group equity and does not hold any voting interests within the control group**, shall not be considered for the purposes of determining whether the applicant (or licensee) is eligible for a license for frequency Block C or frequency Block F under this section.

(3) Where an applicant (or licensee) is a consortium of small businesses, the gross revenues and total assets of each small business shall not be aggregated.

(4)(i) The gross revenues, total assets and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered for purposes of determining financial eligibility so long as (A) such person holds no more than 25 percent of applicant's (or licensee's) passive equity and is not a member of the applicant's (or licensee's) control group; (B) the applicant (or licensee) has a control group that owns at least 25 percent of the applicant's (or licensee's) total equity, **on a fully diluted basis,** and, if a corporation, holds at least 50.1 percent of the applicant's (or licensee's) voting interests.

(ii) The gross revenues, total assets and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered for purposes of determining financial eligibility so long as (A) such person holds no more than 49.9 percent of applicant's (or licensee's) passive equity and is not a member so the applicant's (or licensee's) control group; (B) the applicant (or licensee) has a control group that consists entirely of members of minority groups and/or women and that owns at least 50.1 percent of the applicant's (or licensee's) total equity, **on a fully diluted basis,** and, if a corporation, at least 50.1 percent of the applicant's (or licensee's) voting interests.

(iii) The gross revenues, total assets and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered for purposes of determining financial eligibility so long as (A) such person holds no more than 25 percent of applicant's (or licensee's) total equity, which shall include not more than 15 percent of the voting stock; (B) the applicant (or licensee) is a publicly traded corporation; and (C) the applicant (or licensee) has a control group that holds at least 50.1 percent of the voting stock, if a corporation, and at least 25 percent of the applicant's (or licensee's) equity, **on a fully diluted basis.**

(5) The gross revenues and total assets of an institutional investor (as defined in section 24.720(n)) that is a member of an applicant's (or licensee's) control group will not be attributed to the applicant (or licensee) if such institutional investor holds up to 25 percent of the entity's total equity, up to 10 percent of which could be held as control group equity as long as the remaining 15 percent is held as passive equity outside the control group, calculated on a fully diluted basis, and the institutional investor does not have voting interests within the control group.

Note: Ownership interests, **including those in the control group,** shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that such agreements may not be used to appear to terminate or divest ownership interests before they actually do so. **Stock options held by members of the control group will only be counted as fully diluted if (1) the stock options vest immediately and unconditionally to the holder upon issuance allowing the holder to exercise the options at his/her sole discretion; and (2) the stock option's strike price is set at, or below, the fair market value of the capitalization of the applicant (or licensee) (i.e., at the offer price of the underlying stock).**

§24.715 Management Contracts.

Management contracts or service agreements between applicants (or licensees) and third parties or investors in the applicant (or licensee) will be considered to transfer de facto control to the third party or investor if such contract or agreement is considered an attributable interest to that third party or investor under the rules adopted on October 20, 1994 in GN Docket No. 93-252.

§24.720 Definitions.

. . . .

(b) Small Business; Consortium of Small Businesses.

(1) A small business is an entity that (1) together with its affiliates has average annual gross revenues that are not more than $40 million for the preceding three calendar years; (ii) has no attributable investor or affiliate that has a personal net worth of $40 million or more **except that individuals with net worth in excess of $40 million that are members of an entity's control group will not be attributed to the small business if such individual does not hold more than 25 percent of the entity's total equity, up to 10 percent of which could be held as control group equity as long as the remaining 15 percent is held as passive equity outside the control group, calculated on a fully diluted basis, and the individual does not have voting interests within the control group;** (iii) has a control group all of whose members and affiliates are considered in determining whether the entity meets the $40 million annual gross revenues and personal net worth standards, **except that institutional investors may hold up to 25 percent of the small business' total equity, up to 10 percent of which could be held as control group equity as long as the remaining 15 percent is held as passive equity outside the control group, calculated on a fully diluted basis, and the institutional investor does not have voting**

interests within the control group; and (iv) such control group holds 50.1 percent of the entity's voting interest, if a corporation, and at least 25 percent of the entity's equity on a fully diluted basis, except that a business owned by members of minority groups and/or women (as defined in subsection (c)) may also qualify as a small business if a control group that is 100 percent composed of members of minority groups and/or women holds 50.1 percent of the entity's voting interests, if a corporation, and 50.1 percent of the entity's total equity on a fully diluted basis and no single other investor hold more than 49.9 percent of passive equity in the entity. Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(2) For purposes of determining whether an entity meets the $40 million gross revenues and $40 million personal net worth standards in paragraph (1), gross revenues and personal net worth shall be attributed to the entity and aggregated as provided in § 24.709(b).

(3) A small business consortium is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfied the definition of a small business in paragraph (1).

. . . .

(j) Passive equity. **(1)** Passive equity shall mean (i) for corporations, non-voting stock or stock that includes no more than fifteen percent of the voting equity; (ii) for partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

(2) Passive equity held by entities (or their affiliates) that are regulated under Title II or Section 332 of the Communications Act and permits the holder to exercise a right of first refusal upon transfer of the license, to employ a capital call option to remove persons in the control group or to provide management contract services which are deemed attributable to the provider under the rules adopted on October 20, 1994 in GN Docket No. 92-252 shall be deemed not to be passive and, therefore, attributable and aggregated with other attributable interests to determine if the applicant (or licensee) is eligible for a license for frequency Block C or frequency Block F.

. . . .

(n) Institutional Investors. Institutional investors shall mean those investment companies (as defined in 15 U.S.C. §80a-3(a) and (b), but without reference to or incorporation of the exemptions

set forth in 15 U.S.C. 80a-3(c); provided, however, that if such investment company is affiliated with other entities, then the investment company and such entities, taken as a whole, must be primarily engaged in the business of investing, reinvesting, distributing, or trading in securities or providing investment management services for securities), insurance companies and banks holding stock through their trust departments in trust accounts. Institutional investors may hold up to 25 percent of an applicant's (or licensee's) total equity, up to 10 percent of which could be held as control group equity as long as the remaining 15 percent is held as passive equity outside the control group, calculated on a fully diluted basis, and the institutional investor does not have voting interests within the control group.

CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, hereby certify that on this 4th day of November, 1994, a copy of the foregoing "Ex Parte Filing by GO Communication Corporation" was served by hand-delivery on the following parties:

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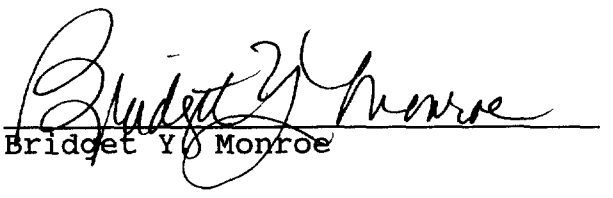

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